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in the Supreme Court of the United States

October Term, 1973

NO. 73-788

ROBERT BROWN, a/k/a BOB BROWN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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NO. _____

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Robert Brown, a/k/a Bob Brown, respectfully prays that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to review the order of that Court rendered September 18, 1973 affirming the judgment of the United States District Court for the Eastern District of Virginia (Kellam, D.J.) upon remand from this Court pursuant to its order of June 25, 1973, convicting him after a nonjury trial, of violating 18 U.S.C. Section 1462 relating to transporting two obscene books in interstate commerce.

OPINION BELOW

The opinion of the District Court for the Eastern District of Virginia is reprinted as an Appendix A to this petition.

The judgment of conviction was affirmed January 31, 1972, based on the opinion of the District Court, (See Appendix B); A petition for a rehearing was denied without a formal opinion on February 24, 1972, (See Appendix C, D); The time to file the original Petition was extended by order of the Court to April 24, 1972, (Appendix E); Subsequently, this Court entered its Order granting the Petition for Writ of Certiorari; vacating the Judgment of the Fourth Circuit Court of Appeals and remanding this cause to the Fourth Circuit on June 25, 1973 (Appendix F); The Fourth Circuit affirmed again, upon remand, on September 18, 1973 (Appendix G); and the time to file this Petition was extended by Order of the Chief Justice to November 17, 1973 (Appendix H); copies of the two books were filed with the original Petition, (United States Supreme Court Case No. 71-1368).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1). The Court of Appeals for the Fourth Circuit affirmed petitioner's conviction upon remand on September 18, 1973.

QUESTIONS PRESENTED

1. Whether Petitioner's conviction for a violation of Title 18 U.S.C., Section 1462 can be affirmed where said provision of the Federal Law is unconstitutionally vague, and whether ex post facto application of new Supreme Court standards to Petitioner's conviction can be permitted.

2. Whether the Government failed to meet its burden of proof with respect to the obscenity vel non of the materials.

3. Whether the Government failed to establish scienter.

4. Whether the review of Petitioner's conviction occasioned by this Court's remand should have been directed to the District Court which convicted Petitioner and not to the Court of Appeals for the Fourth Circuit, and a new trial afforded Petitioner under the principles enunciated in the **Miller** and **Paris Adult Theatre** cases.

CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States,

Amendment I

Id, as pertinent:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; . . .

Amendment V

Id, as pertinent:

> . . . Nor [shall any person] be deprived of life, liberty, or property, without due process of law; . . .

Amendment IV

Id, as pertinent:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment VI

Id, as pertinent:

> In all criminal prosecutions the accused shall enjoy the right . . . , to be confronted with the witnesses against him, . . .

Article 1, Section 9

Id, as pertinent:

> No Bill of Attainder or ex post facto Law shall be passed.

Article 1, Section 10

Id, as pertinent:

> No State shall . . . pass any Bill of Attainder, ex post facto Law . . . .

Statutes Cited:

> 18 U.S.C. Section 1462
>
> 28 U.S.C. Section 1254 (1)

STATEMENTS OF FACTS

On April 24, 1970, David Flanders, an agent of the Federal Bureau of Investigation, executed a search warrant at 225 Granby Street, Norfolk, Virginia, and seized therefrom two (2) books, "Boys Who Seduce Other Boys" and "My Last Time, Never Again," from the bookstore on April 22, 1970.

At the time of the execution of the search warrant, the agents of the Federal Bureau of Investigation also seized a package of slips and invoices covering the transportation in interstate commerce from the Overstock Book Company (of which the Petitioner is President) from New York State to Norfolk, Virginia, by a common carrier, Railway Express Company, on February 23, 1970.

On July 14, 1970, the Grand Jury returned a One Count Indictment charging the Petitioner with a violation of Title 18 U.S. Code, Section 1462, alleging the transportation of two obscene books in interstate commerce from New York to Norfolk, Virginia. These books purport to contain statements made by patients, boys and men, to their psychiatrists, together with photographs of men and boys, some nude. No explicit sexual conduct is depicted.

The Petitioner was arraigned on October 26, 1970, and entered a plea of not guilty. On February 9, 1971, the Petitioner waived a jury trial, and the case was tried before Judge Richard Kellam of the United States District Court for the Eastern District of Virginia, Norfolk Division, on March 18, 1971. Following the grant of immunity to the witness, Manny Balsky, the Government established that the witness had received nine copies of "My Last Time, Never Again" and ten copies of "Boys Who

Seduce Other Boys", which had been shipped in interstate commerce from the Overstock Book Company in New York State, to Norfolk, Virginia, on February 23, 1970. Upon cross-examination, the witness, Manny Balsky, identified various books which Petitioner contended constituted the national contemporary community standards of tolerance in the depiction of sexual matters in erotic literature. The testimony established that these erotic materials were sold in establishments limited to adults only. Following the testimony of Mr. Balsky, the Government rested without attempting to offer expert testimony to establish the prurient appeal of the two books alleged to be obscene, or that the two books exceeded contemporary community standards of tolerance of erotic material at a national, or even local, community level or that the two books were utterly without redeeming social value. The Petitioner moved the Court for a Judgment of Acquittal which was taken under advisement by the Court and the decision reserved, although the Court had not yet viewed the two exhibits which were alleged to be obscene.

Petitioner offered the expert testimony of Dr. Wilbur Hammon, who stated that the two books involved would not appeal to the prurient interest of the average person, although they might have some appeal to some homosexuals, and particularly to pedophiles. The witness also testified that the two books contained as a theme the proposition that it was harmful to practice homosexuality. The psychiatrist was of the opinion that the photographs contained in the two books might appeal to some pedophiles, but that a Sears & Roebuck Catalog would also appeal to the prurient interest of some members of society.

The Petitioner also presented the testimony of Raymond Pechin, who is employed by a national distributor of books and magazines comparable to the two books alleged to be obscene herein. The witness testified to the nationwide distribution of the various books which were marked and identified, all of which contained photographs vividly depicting consummated sexual activities such as fellatio, cunnilingus and coitus; which books are distributed from fifteen adult bookstores in the Tidewater Area and over twenty adult bookstores in Washington, D. C., besides a national distribution in over thirteen cities with which the witness was familiar. Upon completion of all the testimony, the Petitioner again moved the Court for a Judgment of Acquittal, which motion was supported by a written brief. The Government offered no rebuttal testimony.

On June 10, 1971, the Court entered an Opinion and Judgment Order denying the Motion for a Judgment of Acquittal and convicting the Petitioner. On July 28, 1971, the Petitioner was sentenced to serve three years with the execution of sentence suspended and the Petitioner was placed on probation for a period of three years and the Petitioner was ordered to pay a fine of $3,000.00 within six months from the date the Judgment became final. On July 28, 1971, the Petitioner filed his Notice of Appeal to the United States Court of Appeals for the Fourth Circuit.

The Court of Appeals affirmed the conviction on January 31, 1972, based upon the opinion of the District Court.

Petitioner's motion for a rehearing was denied on February 24, 1972, without opinion.

Petitioner's Petition for Writ of Certiorari was granted, the judgment vacated, and the cause remanded to the Fourth Circuit Court of Appeals based on the **Miller v. California** decision on June 25, 1973.

The Court of Appeals, upon remand, affirmed the conviction on September 18, 1973, relying on **Miller v. California, infra.**

It is from that last decision that the instant Petition for Writ of Certiorari is brought.

REASONS FOR GRANTING THE WRIT

I. Petitioner cannot be found guilty of criminal conduct under Title 18 U.S.C. Section 1462.

A. Title 18 U.S.C. §1462 as written and applied is unconstitutionally vague, and, as such, repugnant to the First and Fifth Amendments to the United States Constitution.

The obscenity decisions promulgated by this Court in June, 1973, contain a patent acknowledgment of the vagueness of the prevailing State and Federal obscenity statutes and the judicial havoc wrought by the imprecise and unworkable **Roth-Memoirs** test. Mr. Chief Justice Burger, in **Miller v. California** U.S., 93 S.Ct. 2607 (1973), noted the Court's utter failure to establish precise Constitutional standards when he said:

> Apart from the initial formulation in the **Roth** case, no majority of the Court has at any given

time been able to agree on a standard to determine what constitutes obscene, pornographic material, subject to regulation under the State's police power, at 2609.

The past sixteen years have proved that we are not dealing with "marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls," **Roth v. United States**, 354 U.S. 476, 492. We have instead the unworkable and unconstitutional situation where there is no line at all. Title 18 U.S.C. §1462 is void for vagueness in that no criteria are set forth as would give fair notice of the precise standards of criminality before the commission of the alleged offense.

Federal obscenity statutes have succeeded only in creating a zone of ambiguity by defining criminal behavior with such meaningless moralistic words as "obscene", "lewd", "lascivious", and "filthy."

It was precisely because of the statutory vagueness illustrated so blatantly in 18 U.S.C. Section 1462 that this Court announced new constitutional standards effecting a decisive change in judicial attitudes that had prevailed for decades. The Court was very careful to announce that statutes designed to regulate obscene materials must be carefully limited, and sought to confine the permissible scope of obscenity regulations to works which depict or describe sexual conduct specifically defined by the applicable obscenity statute as written or authoritatively construed.

Statutory vagueness is never commendable. It is even more true, however, that "the vice of unconstitutional

vagueness is aggravated where the statute in question operates to inhibit the exercise of individual freedoms affirmatively guaranteed by the Federal Constitutions," **Cramp v. Board of Public Instruction**, 368 U.S. 278, 287 (1961).

Petitioner is not challenging the now established rule that obscenity lacks First Amendment protection. Rather, he urges that when a statute does make a certain type or kind of communication **the exception** to a constitutional right, imprecision is intolerable. There can be no excuse for vagueness (which could be easily corrected), in a statute such as 18 U.S.C. §1462, which has the tremendous ability and power to vitiate Constitutional rights.

As the Court said in **National Association for Advancement of Colored People v. Button**, 371 U.S. 415 (1963):

> Because First Amendment freedoms need breathing space to survive and the threat of sanction may deter their exercise almost as potently as actual application of sanction, **government may regulate** in the area only with narrow specificity, (at 370 [emphasis added]).

Mr. Justice Douglas, for the Court in **Ashton v. Kentucky**, 384 U.S. 195 (1966) similarly held:

> Vague laws in any area suffer a constitutional infirmity, and when the First Amendment rights are involved the United States Supreme Court looks even more closely, lest, under the guise of

> regulating conduct that is reachable by the police power, freedom of speech or of the press suffer; **such a law must be narrowly drawn** to prevent the supposed evil, (at 385 [emphasis added]).

The objectionable quality of vagueness and overbreadth of 18 U.S.C. §1462 does not depend merely upon the absence of fair notice to the criminally accused or upon the unchanneled delegation of legislative powers, but also upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application, **National Association for Advancement of Colored People v. Button, supra.**

B. THE VAGUENESS OF 18 U.S.C. §1462 CANNOT BE REMEDIED BY JUDICIAL CONSTRUCTION.

It is neither possible nor Constitutional for this Court to create from vague statutes, valid laws through judicial legislation. This Court admitted as much in **Miller, supra** when it said: "We emphasize that it is not our function to propose regulatory schemes for the States. **That must await their concrete legislative efforts,"** at 2616 (Emphasis Added).

It is now necessary for Congress to create legislation anew, adopting, specifically, if it desires, the test suggested in **Miller** so that in the future any elaborations or construction of the **Miller** test can be left to the Courts. Before trial and appellate Courts can begin to construe, there must exist a Constitutionally permissible statute with which to work. There is presently no Federal statute

that can be authoritatively construed to meet the **Miller** test. It is one thing for this Court to suggest constitutionally permissible limits, but it is yet another to add to a statute by authoritative judicial construction "specifically defined sexual conduct" **that has never before been defined or even mentioned by Congress.**

In other words, it is valid judicial interpretation to elaborate on the **Roth** test (as did the **Memoirs** Court) without judicially legislating. It is not permissible to create anew and engraft the **Miller** test on to present statutes.

The affirmance of Petitioner's conviction based on the present statute, attempting to judicially incorporate the **Miller** test of specificity, should be set aside. It is clear that any authoritative judicial construction by the United States Supreme Court incorporating the **Miller** test must fall at this juncture because the statute herein, as written, failed to give Petitioner fair notice that criminal liability is dependent upon a new Supreme Court test that only legal scholars could appreciate at this point in time.

It has always been the sole prerogative of the Legislative Branch to enact law, and Courts have frequently held that they are powerless to construe a statute to save it from its own vagueness.

Courts cannot go beyond the terms of the statute; they have no power of legislation. Simply put, Courts have no power to make laws. **Doe ex.dem. Poor v. Considine,** 6 Wall 458, 18 L.Ed. 869 (1867); **Del Monte M & M Company v. Last Chance M & M Company,** 171 U.S. 55 (1898).

As this Court in **International Bank v. Sherman**, 101 U.S. 403 (1879), held, it is the business of Courts **to execute the law as they find it and not to make or modify it by interpolating qualifications which do not appear in the law itself.** It is a firmly established rule that "Courts must apply a statute as they find it, leaving to the legislature the correction of asserted inconsistencies and inequalities in its operation," **McClain v. Commissioner of Internal Revenue**, 311 U.S. 521, 530 (1940).

The new **Miller** test demands legislative renovation of both State and Federal statutes for the very reason expressed by Justice Holmes in **Prentis v. Atlantic Coast Line Company**, 211 U.S. 210, 226 (1908):

> A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist while legislation looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.

Such a change cannot be made by judicial construction. "If a change is to be made in a statute, Congress, and not the Court, is the one to do it," **Timken Roller Bearing Company v. United States**, 341 U.S. 593, 599 (1951). "It is the judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written," at 575. **United States v. Great Northern R. Company**, 343 U.S. 562 (1952).

The judicial function is limited to the application of facts to a statute on the basis of what Congress has

written and not what Congress might have written. Therefore, 18 U.S.C. Section 1462, without legislative amendment, must fall. Mr. Justice Holmes, delivering the opinion of the Court in **Louisville & N.R. Company v. Central Stock Yards Company**, 212 U.S. 132 (1908), realized the inability of a court to construe statutes to save them from their own vagueness.

> **The want of proper provisions in a statute to make it constitutional cannot be cured by inserting them in judgments under it**; the law itself must save the parties' rights, and not leave them to the discretion of the courts as such, (at 144, [emphasis added]).

C. THE APPLICATION TO THIS CASE OF THE NEW STANDARDS FOR MEASURING OBSCENITY ANNOUNCED BY THE SUPREME COURT ON JUNE 21 AND 25, 1973, VIOLATES THE EX POST FACTO CLAUSES OF ARTICLE 1, SECTIONS 9 AND 10 OF THE FEDERAL CONSTITUTION AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Engrafting **Miller** standards on the instant statute as written or as might be subsequently construed by authoritative judicial construction, in an effort to prevent Congress from having to enact a new statute, punishes one for conduct that was not criminal at the time that it was committed. Hence, such authoritative judicial construction would violate the requirement of the Due Process Clause in that a criminal statute must give fair warning of the conduct which it prohibits. There is no doubt that

the requirement of definitiveness is violated by 18 U.S.C. §1462 because it fails to give a person of ordinary intelligence fair notice that his contemplated actions are (or would be) forbidden by the statute. No man can be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

A man should not have to rely on his lawyers, judges, and court opinions to frame his standard of permissible conduct, especially when dealing with presumptively protected press materials. A reading of the statute should be sufficient. That which one reads must be sufficiently explicit to inform as to what conduct on his part will render him liable to criminal penalties. There should be no cause for men of common intelligence to guess at the meaning or to differ as to its application, at least in the criminal context.

The apparent constitutional imprecision of the Federal statute and its exquisite vagueness, if upheld by this Court, will become retroactively expanded to the detriment of the ordinary adult in our society. Facially, 18 U.S.C. Section 1462 is void for vagueness. The man in the street looking at it, however, will be lulled into a false sense of security because he has no reason to suspect that conduct clearly not described in the statute and outside the scope of the statute as written could be retroactively brought within the scope of the statute by an act of judicial construction. A deprivation of the right of fair warning results from an unforeseeable and retroactive judicial expansion of vague and imprecise statutory language which is clearly contrary to American criminal jurisprudence.

Justice Douglas, speaking for the majority in **Ashton v. Kentucky**, 384 U.S. 195 (1966), condemned the vices of **ex post facto** application of law, in exactly the same form that Petitioner challenges instanter:

> Where an accused is tried and convicted under a broad construction of a statute which would make it unconstitutional, **the conviction cannot be sustained on appeal by a limiting construction which eliminates the unconstitutional feature of the statute, since the trial took place under the unconstitutional construction of the statute,** (at 384. [emphasis added]).

Thus, a statute that is unconstitutionally vague must fail because a limiting construction may not be properly judicially imposed.

The Grand Jury which returned the indictment against the Petitioner herein had been instructed upon the standard of obscenity as it had been formulated in **Memoirs v. Massachusetts**, 383 U.S. 413 (1966). That test required that in order for material to be obscene it must be **"utterly** without redeeming social value." **Memoirs v. Massachusetts**, supra, at 419 (emphasis in original). Consequently, in 1970, when the Petitioner in the case at bar allegedly transported the materials herein, it is fair to assume that he gauged his product against only the **Memoirs** obscenity test. By employing such a strict test history proved that a successful prosecution of the Petitioner for violation of 18 U.S.C. §1462 was "virtually impossible." This test has now been rejected. The **Memoirs** formulation was shelved on June 21, 1973, and the legal definition of obscenity was radically altered, (to the prosecution's benefit).

In the landmark decision of United States v. Lang, No. 10712-HP-CD, ____ F. Supp. ____, (July 18, 1973), that Court held that to try a defendant under the new Miller standards would be to deny him due process of law, if he was arrested before the existence of such new standards. The Court said:

> The newly formulated Miller test eases the prosecutor's burden, and enhances the likelihood of successful prosecution. The new test simply requires that the prosecution show, inter alia, that "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Miller, supra at ____, 41 LW at 4928. In short the Court's new test substantially changes the law of obscenity, and as a general proposition makes it easier to convict the defendants. At p. 2 [Emphasis added]

The Lang, supra, Court went on to say:

> Therefore, to prosecute defendants under the judicially devised Miller definition of obscenity and to instruct the jury on it, would, without fig leaves, be the functional equivalent of an ex post facto application of the law. This the due process clause forbids. Bouie v. City of Columbia, 378 U.S. 347 (1964). (At. p. 3 [Emphasis added]).

That is the case instanter. To now test Petitioner's conviction against the new Miller standards flies in the face of Bouie, supra.

This Court's failure to strike down 18 U.S.C., Section 1462 as being vague will permit an unforeseeable judicial

enlargement of the criminal statute before it, which will be applied retroactively, and which will operate precisely like an **ex post facto** law. All those acts which predate this Court's announcing of new standards and which were done in reliance on the old **Roth-Memoirs** standards now become criminal acts and punishable by judicial fiat.

Congress is barred by the **ex post facto** clause of the Constitution from passing laws of this nature, and so too must this Court as well as all lower State and Federal Courts be prohibited from achieving precisely the same results by judicial construction. Under the latest rulings it is clear that there is no constitutionally permissible Federal obscenity law, and no amount of judicial interpretation can impart constitutionality to a statute that fails to delineate criminal from permissible behavior.

II

BY FAILING TO SUBMIT EVIDENCE IN CONTRAVENTION OF PETITIONER'S AFFIRMATIVE DEFENSE, THE GOVERNMENT DID NOT MEET ITS BURDEN OF PROOF.

The Petitioner concedes that, unlike the requirements under the **Roth** formulation, the June, 1973, Supreme Court decisions make it clear that the Government need not to offer expert testimony in its case in chief to **affirmatively** assert a claim that the materials in issue are obscene.

In **Kaplan v. California**, 93 S.Ct. 2680 (1973), the Court rejected "any constitutional need for expert testimony on behalf of the prosecution, or for any other ancillary evi-

dence of obscenity, once the allegedly obscene materials themselves are placed in evidence," at 2685. In **Paris Adult Theatre v. Slaton,** 93 S.Ct. 2628 (1973), the Court stated:

> Nor was it error to fail to require "expert" affirmative evidence that the materials were obscene when the materials themselves were actually placed in evidence. (At p. 2634 [Emphasis added]).

It must be noted, however, that these holdings are directed only to the issue of the affirmative establishment of the Government's initial prima facie case.

If, indeed, "Photographs speak for themselves," it cannot be validly contended that their utterances establish such a strong presumption of guilt that it is sufficient to stand in the face of any evidence the defense presents.

To so find would be to shackle the defense with an insurmountable burden where the admission of allegedly obscene material into evidence is, ipso facto, proof of its legal obscenity. In the area of presumptively protected First Amendment rights, such a lack of substantive due process is intolerable. The doctrine of Res Ipsa Loquitor has no place in the area of criminal law, see, e.g. **Wiener v. California,** ____U.S.____, 30 L.Ed.2d 539 (1971).

In the case at bar, Petitioner introduced the testimony of Dr. Wilbur Hammon, who stated that the books involved would not appeal to the prurient interest of the average person, although they might appeal to some homosexuals, particularly pedophiles (i.e., homosexuals who have a sexual interest in young children).

The effect of this testimony was the total refutation of the Government's alleged prima facie case. It, therefore, became incumbent upon the Government to introduce countervailing evidence to sustain a conviction, assuming arguendo, that a prima facie case was established.

Where, as here, the Government fails to introduce such evidence, the conviction cannot stand. In **Parks v. United States**, 12 CrL 2022, (D.C. Ct. Appl. 1972), the Court held that the trial Judge had confused the burden of proof with the burden of going forward with the evidence when the Judge found that a defendant who presented evidence of nonobscenity could be convicted after the Government had introduced no evidence other than the film, even when the Judge found the film to be "hard core pornography" and "obscene per se."

Further, in footnote six of **Paris Adult Theatre I v. Slaton**, supra, consistent with previous decisions, this Court specifically reserved judgment on the question here presented, i.e., whether or not expert testimony must be adduced in the case where contested materials are directed at a bizarre, deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the materials appeal to prurient interest.

Clearly, the prurient interest of pedophiles is not within "common knowledge" or full understanding of the average man. The material in this case is not heterosexual in nature and does not appeal to the normal person. The fact that the trier of fact is a judge rather than a jury does not bear on the fact that a full understanding of pedophilia, essential in this case, is lacking absent expert testimony.

The Government failed to meet its burden of proof imposed by both the Petitioner's introduction of expert testimony and the requirements of the trier of fact when dealing with a subject matter outside its common knowledge. Consequently, the Petitioner's Motion for Judgment of Acquittal should have been granted at the conclusion of the Government's case, and failure to do so was reversible error.

III

THE GOVERNMENT FAILED TO CARRY THE BURDEN OF PROVING PETITIONER HAD KNOWLEDGE OF THE CHARACTER OF THE BOOKS.

It is well established that no conviction can be sustained in an obscenity prosecution for the sale of an obscene publication without proof, beyond a reasonable doubt, that the seller had knowledge of its obscene character. **Smith v. California**, 361 U.S. 147 (1959). The same rule must be applicable to one who transports an alleged obscene book in interstate commerce.

In **Smith**, at p. 153, Mr. Justice Brennan speaking for the Court said:

> By dispensing with any requirement of knowledge of contents of the book on the part of the seller, the ordinance tends to impose severe limitations on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose,

> he will tend to restrict the books he sells to those which he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature.

The only evidence adduced by the Government as to scienter in the instant case was that the Petitioner was the president of the corporation that shipped the books involved to a bookstore in Virginia in which he had a financial interest. Both businesses dealt in textbooks and other non-sexually oriented publications. There was no testimony presented that the Petitioner ever personally knew of the transaction whereby the books involved were shipped to Virginia or knew anything of their nature and content.

As the Government's exhibits show, (the two books involved), the defendant was not the publisher of either of them. Accordingly, the Government failed to establish scienter beyond a reasonable doubt.

As Mr. Justice Frankfurter said in **Smith**, supra, at page 161:

> The Court accepts the settled principle of constitutional law that traffic in obscene literature may be outlawed as a crime. But it holds that one cannot be made amenable to such criminal outlawry unless he is chargeable with knowledge of the obscenity. Obviously, the Court is not holding that a bookseller must familiarize himself with the contents of every book in his shop . . . How much or how little awareness that a

book may be found to be obscene suffices to establish scienter, or what kind of evidence suffices to establish scienter, or what kind of evidence may satisfy the how much or the how little, the Court leaves for another day.

IV

REMAND BY THE UNITED STATES SUPREME COURT SHOULD HAVE BEEN DIRECTED TO THE UNITED STATES DISTRICT COURT, NORFOLK DIVISION, FOR ITS CONSIDERATION OF THE GUILDELINES SET FORTH IN MILLER V. CALIFORNIA, AND NOT TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT.

The Petitioner was indicted by a Federal Grand Jury which judged the Petitioner's alleged conduct by the **Roth-Memoirs** test. The United States District Court for the Eastern District of Virginia sitting without a jury found the Petitioner guilty under the **Roth-Memoirs** test. It clearly follows that the forum best suited to judge and compare Petitioner's allegedly criminal conduct in light of the June, 1973, Supreme Court decisions, is that same original trial Court.

This conclusion becomes imperative in view of the fact that **Miller** dictates the application of "local community standards" and not the previously governing national guidelines. Where a one-judge District Court may be able to evaluate the contemporary community standards, (if the scope of local is defined), clearly three Appellate Court Judges from not only dissimilar commu-

nities but also different states, cannot be called upon to assess the standards of a particular locality, which in this case must be Norfolk, Virginia.

Further, it is apparent that a new judicial inquiry into the question of the obscenity of the materials herein by the application of an altered definition and different standards, involves a fact finding process. Such a function lies expressly within the powers of the District Court, and not with the Court of Appeals, even though the question of the obscenity vel non of the materials is a sensitive constitutional matter. Moreover, if Petitioner's conduct is to now be judged by a new standard (i.e. Miller), then Petitioner is entitled to a New Trial, preferably before a Jury. Surely The First and Fifth Amendments compel this result, as a matter of justice.

CONCLUSION

Petitioner can best sum up his Petition by reminding this Court of the language of Mr. Justice Douglas in his recent dissenting opinion in **Trinkler v. Alabama**, —U.S.—, —S. Ct.—, Slip Sheet Opinion pages 2-5, decided October 23, 1973:

> Just recently this Court reiterated that "[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."
>
> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what it prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, here a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer

> far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked."

The exceptions to the First Amendment written into the Constitution by the majority, which we now ask the court below to apply on remand, could not more clearly exhibit these evils of vagueness. Following the old **Roth** standards, the Court adopted the approach in **Redrup** of deciding each case on an **ad hoc** basis without attempt to offer guidance for future adjudications. A new majority of five now tries again, with reworked **Roth** standards which allow much freer reign to the predilections of local authorities. But this greater latitude only exacerbates the problem of vagueness.

Every author, every bookseller, every movie exhibitor, and perhaps, every librarian is now at the mercy of the local police force's conception of what appeals to the "prurient interest" or is "patently offensive." The standard can vary from town to town and day to day in an unpredictable fashion. How can an author or bookseller or librarian know whether the community deems his books acceptable until after the jury renders its verdict? The meaning of the standards necessarily vary according to eah person's own idiosyncracies. The standards fail to give adequate notice and invite arbitrary exercise of police power. The evil is multiplied because of the danger to First Amendment values of free expres-

sion. "Bookselling should not be a hazardous profession." (**Ginsberg v. New York,** 390 U.S. 629, 674 (Fortas, J., dissenting).

If the magazines in question were truly "patently offensive" to the local community, there would be no need to ban them through the exercise of police power; they would be banned by the marketplace which provided no buyers for them. Thus it must be the case that some substantial portion of the public not only found them not offensive, but worthy of purchase. How can the bookseller or librarian be sure which of the publications on his shelves are offensive to the majority? Perhaps he will be safe if he sells only publications with a certified history of broad appeal, thus attempting to "steer wide of the unlawful zone." Yet there are many who deem some magazines offensive and even lingerie advertisements in the Sunday papers. A bookseller or a librarian can never know if some jury will find those views representative of the community. A movie exhibitor in Georgia has just found himself convicted under that State's obscenity laws for showing a film which received much critical acclaim, and an Oscar nomination for the female lead. We deal here with criminal prosecutions under which a man may lose his liberty. Our Constitution requires fair notice so that the law-abiding can conform their conduct to the requirements of the law.

This requirement is not new, and state enactments attempting to proscribe publication of certain content have run afoul of it before. In **Winters v. New York**, 333 U.S. 507 (1948), the Court considered a New York law which, after the gloss placed upon it by the New York courts, prohibited as obscene the publication of "collections of criminal deeds of bloodshed or lust ". . . so massed as to become vehicles for inciting violent and depraved crimes against the person . . . " (Id. at 513.) In affirming the conviction the New York court noted that "[i]n the nature of things there can be no more precise test of written indecency or obscenity than the continuing and changeable experience of the community as to what types of books are likely to bring about the corruption of public morals . . ." (Id., at 514) The New York court concluded " . . . when reasonable men may fairly classify a publication as necessarily or naturally indecent or obscene, a mistaken view by the publisher as to its character or tendency is immaterial." (Ibid.) But this Court disagreed; it did not find the "continuing and changeable experience of the community" adequate specification to support a criminal conviction, for "men of common intelligence" would have to guess at the meaning of the prohibition against publication of stories "so massed as to become vehicles for inciting violent and depraved crimes." (Id., at 518-519).

The standards of **Miller** are not better. [Footnotes and citations omitted.]

For the above and foregoing reasons, this Petition for a Writ of Certiorari should be granted and Petitioner's conviction reversed.

Respectfully submitted,

JOHN HIRSCHHORN, ESQ.
Attorney for Petitioner
1040 City National Bank Building
25 West Flagler Street
Miami, Florida 33130
(305) 358-5320

MORRIS J. EZRA, ESQ.
Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petition for Writ of Certiorari was mailed to the SOLICITOR GENERAL of the United States, Washington, D. C., this_____day of November, 1973.

JOEL HIRSCHHORN

APPENDIX A

OPINION OF THE COURT BELOW

OPINION AND JUDGMENT ORDER

On July 14, 1970, the grand jury returned a one-count indictment charging Robert Brown with a violation of 18 U.S.C. § 1462. Specifically, the indictment alleges that Brown knowingly used the Railway Express Agency for transporting copies of two obscene books in interstate commerce from New York to Norfolk, Virginia. At his arraignment on October 26, 1970, Brown entered a plea of not guilty. On February 9, 1971, Brown waived a jury trial and moved to dismiss the indictment, claiming that 18 U.S.C. § 1462 is unconstitutional. By an Order dated February 17, 1971, this Court postponed determination of the constitutional question until after presentation of the evidence so that all the issues could be briefed and decided together. The case was tried before the Court on March 18, 1971; at the conclusion of the government's case-in-chief and after presentation of all the evidence, Brown moved for a judgment of acquittal pursuant to Fed. R. Crim. P. 29.

I

The two books named in the indictment, "My Last Time Never Again" and "Boys Who Seduce Other Boys," are essentially the same. Each consists of about a hundred pages of text and photographs. The text consists of several short "stories," seven in each book, explicitly describing: various homosexual activities, including fellatio and sodomy, between men and boys. The photographs generally

show one or two boys completely nude, with their genitals exposed. While the photographs do not illustrate the homosexual activity so graphically described in the text, many of them show the figures in close contact, occasionally with their genitals touching.

The evidence is not in conflict in any material way. The principally contested factual issue is whether the two books are actually obscene. The statute under which Brown was indicted, 18 U.S.C. § 1462, prohibits the use of any express company or other common carrier for carriage in interstate commerce of "any obscene, lewd, lascivious, or filthy book, pamphlet, picture . . . or other matter of indecent character."[1] To sustain a conviction

[1]The constitutionality of 18 U.S.C. § 1462 will be discussed infra at II.

under this section, there must be proof that Brown knowingly used some means of interstate commerce for the transportation and delivery of obscene materials.

a.

While the government has the burden of proving that Brown had knowledge of the character of these particular materials, Smith v. California, 361 U.S. 147 (1959), Brown's belief that the books would or would not be characterized as obscene is immaterial. See Kahm v. United States, 300 F.2d 78 (5th Cir. 1962). Evidence of Brown's knowledge of the nature of these two books came from his business associate, Manny Balsky. Balsky manages Manny's Bargain Books, an "adult" book store in Norfolk, but Brown is president of the corporation through which they operate. Brown is also president of the Overstock Book Co. (Brown Book Co.) in New York. Overstock is in the business of

publishing and wholesaling. According to an arrangement, Brown selects the books and other materials in New York and sends them to Balsky for resale in Norfolk.[2] Balsky stated that all of his "adult" books came from Overstock and that Brown selected the books to be shipped. Also, Balsky testified that the books he received from Brown were shipped by Railway Express. Brown was, and still is, engaged in the commercial exploitation of this kind of material. The conduct of Brown's business as revealed by Balsky's testimony and Overstock's invoice with its attached list of the materials sent sufficiently show that Brown knew exactly what these materials were. That he believed the books would be constitutionally protected, however, is no defense.

b.

Brown does not challenge the government's proof that he shipped the books in interstate commerce. Balsky testified that he dealt exclusively with Bob Brown of Overstock Book Co. and that when FBI Agent Flanders seized these two books, all the "adult" books in his store came from Brown in New York via Railway Express. The invoice shows that the books were shipped by Overstock Book Co. (Brown Book Co.) in New York for delivery to Manny's Bargain Books in Norfolk. The package slip at-

[2]In the store they are separated from other books; are restricted as "Girlie" and "Men" magazines, and Balsky tries to keep them from view of ladies and children. No one can intentionally avoid knowledge by closing his eyes to facts which should prompt him to investigate. See Griego v. United States. 298 F.2d 845, 849 (10th Cir. 1962); United States v. Erie R.R. Co., 222 F. 444, 450 (3d Cir.); United States v. Gen. Motors, 226 F.2d 745, 749 (3d Cir.); United States v. Bletterman, 279 F.2d 320, 322 (2d Cir. 1960); Beck v. United States, 305 F.2d 595, 599 (10th Cir. 1962).

tached to the invoice shows that the shipping carton contained nine copies of "My Last Time Never Again" and ten copies of "Boys Who Seduce Other Boys." Clearly, this element of the offense has been proved.

c.

The real issue in this case, of course, is whether these two books are actually obscene. The Supreme Court has held, more than once, that obscenity is outside the scope of First Amendment protection. E.g., United States v. Reidel, — U.S. — (May 3, 1971). The Supreme Court set out the test for determining obscenity in Roth v. United States, 354 U.S. 476 (1957), but the test was modified in Memoirs v. Massachusetts (Fanny Hill), 383 U.S. 413 (1966). The Roth-Fanny Hill test contains three elements: (1) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (2) the material is patently offensive because it affronts contemporary community standards relating to the description and representation of sexual matters; and (3) the material is utterly without redeeming social value.

Brown argues that this Court must acquit him because the government presented no expert testimony that the two books are obscene. As authority for this position, Brown relies on United States v. Klaw, 350 F.2d 155 (2d Cir. 1965), which does indicate some of the problems involved in determining questions of prurient interest and contemporary community standards. Specifically, the problems include "how," "by whom," and "on what basis" these determinations are to be made. Klaw, however, is not controlling here, for as the Second Circuit Court of Appeals subsequently pointed out, the particular facts in Klaw

required such testimony. United States v. Wild, 422 F.2d 34 (2d Cir. 1969). The two books named in this indictment appear to be substantially different from the materials discussed in Klaw. These books, while the photographs are somewhat less offensive than the color slides involved in Wild, give graphic textual descriptions of the same homosexual activities illustrated on the slides in Wild. Judge Lumbard stated in Wild, "The question of obscenity can be disposed of merely by stating that these slides are unquestionably hard core pornography. * * * There is no conceivable claim that these color slides have redeeming social value. * * * [H]ard core pornography such as this can and does speak for itself." 422 F.2d at 35-36. And in Ginzburg v. United States, 383 U.S. 463, 465, the Court said that in the cases in which it had "decided obscenity questions since Roth, it has regarded the materials as sufficient in themselves for the determination of the question." Clearly, these two books constitute hard core pornography and, therefore, are outside the limits of constitutional protection. In his concurring opinion in Jacobellis v. Ohio, 378 U.S. 184, 197 (1964), Mr. Justice Stewart, speaking of hard core pornography, stated "I know it when I see it." Surely, these two books fall within that category. There is no need that experts be called to testify that these two books are obscene.

Despite the character of the text. Brown claims that these books do have some redeeming social value. To prove this assertion. Brown offered the testimony of Dr. Wilbur Hamman, a psychiatrist at St. Elizabeth's Hospital in Washington. Dr. Hamman stated his opinion that the two books would not appeal to the "prurient interest of the relatively normal American" although they might appeal

to some homosexuals and pedophiles.[3] When asked if there was "any theme" in either book. Dr. Hamman, referring to "My Last Time Never Again." stated that "the theme, in general, is that homosexuals are pretty messed up and sick people and you ought to stay away from them or you're going to get in trouble." Speaking of the other book, "Boys Who Seduce Other Boys," Dr. Hamman stated, "what it showed to me was a number of very messed up people getting involved with each other, but I don't think the theme came through as clearly as it did in the first book."[4] The "theme" of which Dr. Hamman speaks is so disguised among the graphic descriptions of homosexual activities that is such a "theme" does indeed exist it is hardly discernable. The term "theme" is an over-statement at best, and the purported "message" certainly is not "dominent." The few sentences at the end of some of the stories, where one of the parties expresses remorse over his situation which resulted from involvement with homosexuals, do not add any redeeming social value as Brown claims.

Referring to the photographs in the two books, Dr. Hamman stated that they would appeal to some homosexuals and pedophiles, but not necessarily any more than a Sears & Roebuck catalogue. Likewise, Dr. Hamman indicated that these books were no more revolting than a television commercial showing a man brushing his teeth. The realm of psychiatry is indeed highly technical and

---

[3]Dr. Hamman described the writing as "revolting" and as "shocking writing," but he did not have an opinion as to whom it would appeal.

[4]In "Boys Who Seduce Other Boys" one of the stories tells of how the two boys are now living together and enjoying themselves, and another tells of how one of the boys is still in love with the other boy. Is this redeeming social value?

beyond the understanding of laymen, but these conclusions seem absurd. It goes without saying that the difference between a Sears & Roebuck catalogue or a toothpaste advertisement and these two books is almost immeasurable. Unquestionably the descriptions in these books far exceed the limits of candor required to explain the detrimental aspects of homosexuality.

Brown also offered the testimony of Raymond Pechin, the national sales manager of Potomac News Company, in an attempt to establish the nationwide distribution of books and magazines comparable to "My Last Time Never Again" and "Boys Who Seduce Other Boys." Pechin is in a position to know this fact since his company is a large distributor of materials for "adult" bookstores. This national distribution ranged up to 80,000 copies for magazines containing photographs depicting the same sexual activities described in these two books. Pechin did admit, however, that the distribution of these "adult" materials was rather small in comparison with other publications. Pechin also agreed that these books would be "patently offensive" to "the vast majority of the American populace."

This Court has also considered the other materials presented as exhibits. Testimony indicated that many of these books are available at "adult" bookstores in Norfolk. Counsel's point, apparently, is that the same kinds of materials, or worse, are widely sold in this area but go unprosecuted by law enforcement authorities. Whether or not these "comparison" materials are obscene is immaterial; however, all of them can be distinguished in one way or another from the two books named in this indictment. The first group of pamphlets consists of photographs only. While the photographs in some of the books may be

more suggestive than the photographs in the subject books, there is no text, and the text is mainly what makes "My Last Time Never Again" and "Boys Who Seduce Other Boys" so patently offensive. Some of the books contain photographs which graphically illustrate various homosexual and heterosexual activity, and in this respect the books are more offensive than what we are dealing with here. However, the texts in these books might arguably have some "redeeming social value" in that they purport to be psychiatric or historical examinations, with some "case studies," of the particular subject involved. Basically these texts may be said to be sex education manuals in this respect are significantly different from the descriptions in "My Last Time Never Again" and "Boys Who Seduce Other Boys." See United States v. Gower, 316 F.Supp. 1390, 1395 (D.D.C. 1970).

Despite Brown's contentions to the contrary, the dominant theme of these two books, taken as a whole, appeals to a prurient interest in sex, the books are patently offensive because they affront contemporary standards relating to the description or representation of sexual matters, and both books are utterly without redeeming social value. United States v. Wild, supra; United States v. Gower, supra. All three elements coalesce in these two books.

II

Brown also contends that the statute under which he was indicted, 18 U.S.C. § 1462, is unconstitutional. Brown's argument is that consonant with an individual's right to possess obscene materials in his home, Stanley v. Georgia, 394 U.S. 557 (1969), "there must be a correlative right for that individual to acquire the literary material to be

enjoyed in the privacy of his home, regardless of the literary merit or redeeming social value of the material." This claim, however, has recently been rejected by the Supreme Court.

In Gable v. Jenkins, 397 U.S. 592 (1970), the Supreme Court affirmed the decision of a three judge district court, 309 F.Supp. 998 (N.D. Ga. 1969), holding that Stanley v. Georgia did not invalidate a Georgia statute prohibiting the distribution of obscene materials.

Two more recent decisions, United States v. Thirty-Seven Photographs, ____ U.S. ____ (May 3, 1971) and United States v. Reidel. ____ U.S. ____ (May 3, 1971), effectively foreclose any question of governmental power to control the distribution of obscene matter. In Thirty-Seven Photographs, the Supreme Court held that there is no constitutional impediment to a federal statute, 19 U.S.C. § 1305(a), prohibiting the importation of obscene materials for private use or public distribution. In Reidel, the Court held that 18 U.S.C. § 1461, which prohibits the knowing use of the mails for the delivery of obscene matter, is constitutional as applied to willing recipients who state that they are adults. Each of these cases involved the commercial exploitation of obscenity, and the Court distinguished these situations from that in Stanley v. Georgia, supra, where the Court recognized that the private possession of obscene materials is constitutionally protected. There is no reason why commercial distribution under 18 U.S.C. § 1462 should be treated otherwise. Speaking of this commercialism in Thirty-Seven Photographs, the Court stated,

> Whatever the scope of the right to receive obscenity adumbrated in Stanley, that right, as we said in Reidel, does not extend to one who is seeking, as was Luros here, to distribute obscene materials to the public, nor does it extend to one seeking to import obscene materials from abroad, whether for private use or public distribution.

And continuing, the Court said of such material,

> Congress may declare it contraband and prohibit the importation.

Further, the Court said,

> Obscene materials may be removed from the channels of commerce when discovered in the luggage of a returning foreign traveler even though intended solely for his private use.

Reidel speaks to the same effect: there the Court stated that the language of Stanley v. Georgia, focusing on "freedom of mind and thought and on the privacy of one's home . . . does not require that we fashion or recognize a constitutional right in people like Reidel to distribute or sell obscene materials." In both these cases, the Court recognized a clear distinction between dealers in pornography, like Luros and Reidel, and the private user like Stanley. In both cases, the Court ruled that federal statutes controlling the delivery of obscene matter are constitutional when applied to persons doing business in obscenity. We see no reason why the Supreme Court would reach a different result in a similar case prosecuted under 18 U.S.C. § 1462.

Robert Brown, like Milton Luros and Norman Reidel, is in the business of selling and distributing obscene matter. Clearly, 18 U.S.C. § 1462, which prohibits the knowing use of an express company or other common carrier for carrying obscene materials in interstate commerce, is constitutional when applied to Robert Brown and the facts of this case. See United States v. Miller, 431 F.2d 655 (9th Cir. 1970); United States v. Fragus, 428 F.2d 1211 (5th Cir. 1970); United States v. Melvin, 419 F.2d 136 (4th Cir. 1969).

Having determined that 18 U.S.C. § 1462 is constitutional as applied to the facts of this case, that "My Last Time Never Again" and "Boys Who Seduce Other Boys" constitute hard core pornography and are obscene, that Robert Brown caused these books to be shipped in interstate commerce, and that Brown knew of the character of these books, Brown's motion for a judgment of acquittal must be denied. The evidence establishes beyond a reasonable doubt that Robert Brown violated 18 U.S.C. § 1462. Accordingly, Brown is found guilty and a judgment of conviction is entered. Counsel will arrange an agreeable time for defendant to appear for sentencing. If counsel for defendant desires the Court to order a presentence report, he shall within five days so advise the Court and arrange for defendant to report to the probation officer of this Court. Counsel will advise defendant of his right to refuse to answer any questions relative to the facts of the charge.

/s/ Richard B. Kellam

United States District Judge

Norfolk, Virginia
June 9th, 1971.

APPENDIX B

[TITLE OMITTED]

(Argued December 9, 1971 Decided January 31, 1972.)

Before BOREMAN, Senior Circuit Judge, BUTZNER and RUSSELL, Circuit Judges.

Stanley M. Dietz (James B. Power and Joel Hirschhorn on brief) for Appellant, and Donald Feige, Attorney, Department of Justice (Brian P. Gettings, United States Attorney, and John A. Field, III, Assistant United States Attorney, on brief) of Appellee.

PER CURIAM:

Charged in a one-count indictment with the transportation of obscene material through the channels of interstate commerce by a common carrier in violation of Section 1462, 18 U.S.C., the defendant waived a jury trial, and, upon trial by the Court, was convicted and given a suspended sentence of three years, placed on probation for three years and fined $3,000.00. From such conviction he has appealed. We affirm on the basis of the opinion of the opinion of the District Court. ____ F.Supp. ____ (1971).

AFFIRMED

APPENDIX C

PETITION FOR REHEARING

Pursuant to Rule 40, Federal Rules of Appellate Procedure, Appellant, Robert Brown, respectfully petitions for rehearing of the Court's decision of January 31, 1972.

POINT FOR REHEARING

Appellant moves the Court to reconsider its Opinion of January 31, 1972, upon the ground that this Court's Opinion is in direct conflict with the Opinion of the United States Court of Appeals for the Fifth Circuit in Case No. 71-1091, United States of America vs. William Groner, decided January 11, 1972, wherein the Court held the Government was required to introduce testimony and evidence of prurient interest appeal, contemporary community standards and utter failure of socially redeeming content, before a conviction could be had in an obscenity prosecution. Therefore, Appellant argues that this Court should reconsider its Per Curiam Opinion and reverse the Appellant's conviction.

/s/ Stanley M. Dietz

Stanley M. Dietz
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February, 1972, I mailed two copies of the Petition for Rehearing herein to Donald Fiege, Esquire, Attorney for Appellee, Department of Justice, Washington, D.C.

/s/ Stanley M. Dietz

Stanley M. Dietz
Attorney for Appellant

APPENDIX D

[TITLE OMITTED]

ORDER OF DENIAL FOR REHEARING

Upon consideration of the petition for rehearing, and with the concurrence and approval of the other members of the panel,

IT IS ORDERED AND ADJUDGED, That the petition for rehearing be and the same is hereby denied.

For the Court:

/s/

United States Circuit Judge

FILED
FEB. 24, 1972
SAMUEL W. PHILLIPS
CLERK

APPENDIX E

[TITLE OMITTED]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 24, 1972.

/s/ W.E.B.

Chief Justice of the United States

Dated this 21
day of March, 1972

APPENDIX F

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI, VACATING JUDGMENT AND REMANDING CAUSE

No. 71-1368. Robert Brown, petitioner, v United States

June 25, 1973. On petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit. Petition for writ of certiorari granted, judgment vacated, and case remanded to the Court of Appeals for further consideration in light of Miller v California, — US —, 37 L Ed 2d 419, 93 S Ct — (1973); Paris Adult Theatre I v Slaton, — US —, 37 L Ed 2d 446, 93 S Ct — (1973); Kaplan v California, — US —, 37 L Ed 2d 492, 93 S Ct — (1973); U.S. v 12 200 ft. Reels of Super 8mm Film, — US —, 37 L Ed 2d 500, 93 S Ct — (1973); U.S. v Orito, — US —, 37 L Ed 2d 513, 93 S Ct — (1973); Heller v N.Y., — US —, 37 L Ed 2d 745, 93 S Ct — (1973); Roaden v Ky., — US —, 37 L Ed 2d 757, 93 S Ct — (1973); Alexander v Virginia, — US —, 37 L Ed 2d 993, 93 S Ct — (1973). Mr. Justice Douglas would grant certiorari and reverse judgment. See Miller v California, — US —, 37 L Ed 2d 419, 93 S Ct — (dissenting opinion of Justice Douglas). Mr. Justice Brennan, joined by Mr. Justice Stewart and Mr. Justice Marshall, would grant certiorari, vacate judgment, and remand for further proceedings not inconsistent with his dissent in Paris Adult Theatre I v Slaton, — US —, 37 L Ed 2d 446, 93 S Ct —. See Miller v. California, — US —, 37 L Ed 2d 419, 93 S Ct — (dissenting opinion of Justice Brennan).

APPENDIX G

[TITLE OMITTED]

ORDER UPON REMAND

On petition for certiorari, the judgment of this court was vacated and the cause remanded for further consideration in the light of Miller v. California, ___ U.S. ___ (1973); Paris Adult Theatre I v. Slaton, ___ U.S. ___ (1973); Kaplan v. California, ___ U.S. ___ (1973); U.S. v. 12 200-Ft. Reels of Super 8mm Film, ___ U.S. ___ (1973); U. S. v. Orito, ___ U.S. ___ (1973); Heller v. N. Y., ___ U.S. ___ (1973); Roaden v. Kentucky, ___ U.S. ___ (1973); and Alexander v. Virginia, ___ U.S. ___ (1973).

Upon further consideration in the light of those cases, supra, we affirm the judgment of conviction.

For the court, with the approval and consent of Judge Boreman, Senior Circuit Judge, and Judge Butzner, Circuit Judge.

/s/ D. Russell

Circuit Judge

FILED
SEP 18 1973
WILLIAM K. SLATE, II
CLERK

APPENDIX H

[TITLE OMITTED]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 17, 1973.

/s/ Warren E. Burger

Chief Justice of the United States

Dated this 17th
day of October, 1973.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-788

ROBERT BROWN, a/k/a BOB BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner was convicted of transporting obscene materials in violation of 18 U.S.C. 1462. He raises several of the issues involved in a case in which the Court recently granted the petition for a writ of certiorari, and also asserts that the prosecution failed to rebut his expert testimony or to prove *scienter.*

Following a jury-waived trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of transporting two obscene books from the State of New York to Norfolk, Virginia, by common carrier, in violation of 18 U.S.C. 1462. He was fined $3,000 and placed on probation for three years. The court of appeals affirmed *per curiam* (Pet. App. B 12). On June 25, 1973, this Court granted his petition for a writ of certiorari, vacated the judgment, and remanded to the court of appeals for further considera-

tion in light of *Miller* v. *California*, 413 U.S. 15, and companion cases (Pet. App. F 17). The court of appeals, after further consideration in light of those cases, again affirmed the conviction (Pet. App. G 18).

The essential facts are not in dispute and are set out in the Memorandum for the United States in Opposition to petitioner's previous petition. *Brown* v. *United States*, No. 71-1368.[1] Petitioner was convicted under the *Roth-Memoirs*[2] standard for his transportation of obscene material. At trial he introduced the testimony of a psychiatrist and examples of allegedly comparable materials on the issue of obscenity. The government relied solely on the books themselves.

1. Petitioner raises several questions regarding the effect that this Court's decisions in *Miller* and companion cases have on his case. He contends that 18 U.S.C. 1462 does not satisfy the *Miller* requirement that the statute specifically define the sexual conduct which may not be depicted or described, and that a definition cannot be supplied by judicial construction; that the *Miller* standards may not be applied to his conviction without violating *ex post facto* principles and due process; and that in any event, the new requirement in *Miller* that the materials be judged by local or state community standards necessitates a remand to the trial court for a new trial, rather than to the court of appeals. These are essentially the same issues raised in *Hamling* v. *United States*, No. 73-507, certiorari granted, January 14, 1974. Accordingly, it would appear appropriate to defer disposition on these issues until after *Hamling* is decided.

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[1]We are providing counsel with a copy of the Memorandum.

[2]*Roth* v. *United States*, 354 U.S. 476; *Memoirs* v. *Massachusetts*, 383 U.S. 413.

2. There is no substance to petitioner's remaining claims. His contention that the government was required to introduce independent evidence with respect to the books' prurient appeal was rejected in *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 56, and *Kaplan* v. *California*, 413 U.S. 115, 121-122. The Court in *Paris Adult Theatre I* stated: "Nor was it error to fail to require 'expert' affirmative evidence that the materials were obscene when the materials themselves were actually placed in evidence" (413 U.S. at 56).

Petitioner urges, however, that the Court's use of the word "affirmative" indicates that while expert testimony is not necessary in the government's case in chief to establish a *prima facie* case, if the defendant introduces expert testimony denying the obscenity of the materials, then the government cannot sustain a conviction without introducing countervailing evidence. The finder of fact, whether judge or jury, is not required to accept the opinion of expert witnesses as conclusive. See *Hightower* v. *United States*, 325 F.2d 616, 619 (C.A.D.C.), certiorari denied, 384 U.S. 994. The district court here gave ample reason for rejecting the testimony of petitioner's expert witnesses (Pet. App. A 5-7), and its findings should not be disturbed. Moreover, *Kaplan* v. *California, supra*, 413 U.S. at 121, indicates that while the defense may introduce such expert testimony as it wishes, the materials themselves may still be sufficient to establish obscenity.[3]

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[3]The materials here involved are not directed at such a bizarre deviant group as to render the experience of the trier of fact inadequate to judge their prurient appeal. Cf. *Paris Adult Theatre I* v. *Slaton, supra*, 413 U.S. at 56, n. 6. Petitioner's own expert testified that these materials might appeal to homosexuals and pedophiles. As the trial court pointed out (Pet. App. A 4-5),

Petitioner also contends, as he did in his first petition, that the government failed to prove his knowledge of the character of the books. This issue was fully answered in our Memorandum in Opposition to his first petition and by the district court's opinion (Pet. App. A 2-3), upon which we rely here.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.

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these materials differ from the materials in *United States* v. *Klaw*, 350 F.2d 155 (C.A. 2), and are substantially the same as those involved in *United States* v. *Wild*, 422 F.2d 34 (C.A. 2), certiorari denied, 402 U.S. 986, which were found to be sufficient, in and of themselves, to establish obscenity.

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in the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-788

ROBERT BROWN, a/k/a BOB BROWN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

Petitioner, ROBERT BROWN, a/k/a BOB BROWN, pursuant to Supreme Court Rule 58, files this his Petition for Rehearing of this Court's Order denying Certiorari in the above styled cause entered on July 25, 1974.

Petitioner respectfully contends this Court's decision denying his Petition for Writ of Certiorari is in error, and would show as follows:

1) Apparently the instant Petition for Writ of Certiorari was denied, at least in part, due to what was sub-

stantially a clerical error. Although this Court found that Petitioner had raised the issue of the obscenity vel non of the materials involved, it denied his Petition because "the materials themselves ha[d] not been filed with this Court." In fact, the two books which were the subject matter of this case (No. 73-788), had been previously certified and filed with this Court in Petitioner's original Petition for Writ of Certiorari, Brown v. United States, 413 U.S. 912 [United States Supreme Court Case No. 71-1368] (1973).[1] In the instant Petition, Petitioner made specific and repeated references to that fact, both in the "Appendix Index" at Page IV, and in the section designated "Opinion Below" at Page 2, believing in good faith that further certification was unnecessary since the Exhibits were already in the Courts' possession.

Clearly, as stated by Stern and Gressman, Supreme Court Practice:

> Where the original Petition was denied because of a jurisdictional defect which the Court expresaly noted or which was quite obvious, a Petition for Rehearing can be the vehicle for demonstrating that the defect has been cured or was non-existent, thereby resulting in the granting of Certiorari if all other factors are favorable. At 526.

[1]Upon receipt of the Order denying Certiorari herein, Counsel contacted the Clerk of this Court and requested that the Exhibits be transferred from this Court's file in U.S. Supreme Court Case No. 71-1368 to the instant Petition for Writ of Certiorari file, U.S. Supreme Court Case No. 73-788. The undersigned is informed and does believe that the Clerk of this Court has, in fact, done so.

For example, in **Cafeteria Employees' Union v. Angelos,** 319 U.S. 753, 754 (1943), a Petition for Writ of Certiorari was denied because it did not appear that the federal question presented had been properly presented to, or expressly passed on by, the New York Court of Appeals. However, upon a showing, in the Petition for Rehearing, that the question was properly presented, this Court granted the Petition for Writ of Certiorari and reversed. Similarly, in **Bakery and Pastry Drivers v. Wohl,** 315 U.S. 769, 773 (1941), this Court denied a Petition for Writ of Certiorari because it did not appear that the federal question presented by that Petition had necessarily been decided by the Court of Appeals. The Court of Appeals later certified that such question had been passed upon, a Petition for Rehearing was granted, the Writ of Certiorari granted, and the judgment summarily reversed. Further, in **Brady v. Terminal Railroad Association,** 302 U.S. 678, 688 (1937), the Petition for Writ of Certiorari was first denied because it did not appear from the record that there was a final judgment. The Petition for Rehearing established that there had, in fact, been a final judgment and Certiorari was subsequently granted.

2) The materials at bar, when considered as a whole and compared to materials previously determined by this Court not to be legally obscene, should enjoy constitutional protection from censorship. In both **Hamling v. United States,** ____U.S.____, 41 L.Ed.2d 590 (1974), and **Jenkins v. Georgia,** ____U.S.____, 41 L.Ed.2d 642 (1974), this Court expressly reemphasized its holding in **Miller v. California,** 413 U.S. 15, 25 (1973), that only the depiction, representation, or portrayal of patently offensive "hard core" sexual conduct was not entitled to First Amendment protection.

The materials involved herein are substantially no different than those presented to this Court by the Petitioner in **Trinkler v. Alabama**, ____U.S.____, 15 Cr.L. 4106 [United States Supreme Court Case No. 73-844] (1974), Petition for Writ of Certiorari granted, judgment vacated and remanded in light of **Hamling**, supra, and **Jenkins**, supra. The photographs accompanying the text of the instant materials portray (single and dual) inactive, posed, male nudes, which although sometimes paired and touching, do not exhibit any acts of intercourse, masturbation, bestiality, oral-genital intercourse, or sado-masochism. In fact, the photographs wholly fail to exhibit any specifically defined (and therefore prohibited under **Miller**, supra) simulated or actual sexual activity whatsoever.

Moreover, although the written text does describe explicit sexual activity, this Court has reversed findings of obscenity as to publications devoted entirely to explicit depictions or descriptions of the sexual activities of its characters, including detailed and vernacular descriptions reaching the ultimate in explicitness; see e.g. **Memoirs v. Massachusetts**, 383 U.S. 413 (1966) ("Fanny Hill"); **Aday v. United States**, 388 U.S. 477 (1967) ("Sex Life of a Cop"); **Corinth Publications v. Wesberry**, 388 U.S. 448 (1967) ("Sin Whisper"); **Mazes v. Ohio**, 399 U.S. 453 (1967) ("Orgy Club"); **Hoyt v. Minnesota**, 399 U.S. 524 (1970) ("The Way of a Man With a Maid", "Lady Susan's Cruise Lover", and three other books); and **Grove Press v. Gerstein**, 378 U.S. 577 (1964) ("Tropic of Cancer").

3) Petitioner has been denied his First and Fourteenth Amendment rights by this Court's failure to conduct its own "independent" constitutional review of the instant materials to determine the obscenity vel non of

the materials, under the second and third portions of the tri-parte **Miller**, supra, obscenity test, as mandated by this Court in **Jacobellis v. Ohio**, 378 U.S. 184 (1964), and **Jenkins v. Georgia**, supra. This Court stated in **Jacobellis v. Ohio**, supra, that:

> In other areas involving constitutional rights under the Due Process Clause, the Court has consistently recognized its duty to apply the applicable rules of law upon the basis of an independent review of the facts of each case. (Citations omitted) And this has been particularly true where rights have been asserted under the First Amendment guarantees of free expression ... We cannot understand why the Court's duty should be any different in the present case where Jacobellis has been subjected to criminal conviction for disseminating a work of expression and is challenging that conviction as a deprivation of rights guaranteed by the First and Fourteenth Amendments. At 189, 190.

The Court went on to hold:

> Hence we reaffirm the principle that in "obscenity" cases as in all others involving rights derived from the First Amendment guarantees of free expression, **this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected.** At 190 [Emphasis added].

Clearly, Petitioner is entitled to this constitutional protection instanter, especially in light of this Court's reaffirmation of the need for "independent" review expressed in **Miller v. California**, supra, and, of course, more recently in **Jenkins v. Georgia**, supra, wherein Mr. Justice Brennan states in his concurring opinion:

> After the Court's decision today, there can be no doubt that **Miller** requires appellate Courts — including this Court — to review independently the constitutional fact of obscenity. Moreover, the Court's task is not limited to reviewing a jury finding under part (c) of the **Miller** test that "the work, taken as a whole, lack[ed] serious literary, artistic, political or scientific value." **Miller** also requires independent review of a jury's determination under part (b) of the **Miller** test that "the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law." 41 L.Ed.2d 642 (1974). At 652.

Mr. Justice Brennan concluded by saying:

> In order to make the review mandated by **Miller**, the Court was required to screen the film **Carnal Knowledge** and make an independent determination of obscenity **vel non**. Id.

The need for this constitutional requirement is obvious to avoid the suppression of otherwise protected press materials.

It is respectfully submitted therefore, that this Court, which has not requested the certification of the materials involved, has failed to discharge its admitted responsibility under **Jenkins**, supra, to independently review these materials. At a minimum, Petitioner is entitled to this review here, unless, of course, this Court remands this matter to the original trier of fact for reevaluation of the materials in light of **Miller**, supra; **Jenkins**, supra; and **Hamling**, supra.

CONCLUSION

Based upon the above and foregoing, Petitioner respectfully requests this Honorable Court to grant the Petition for Rehearing herein, and then grant the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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MORRIS J. EZRA, ESQ.
Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petition for Rehearing was mailed to the SOLICITOR GENERAL of the United States, Washington, D. C., this____day of August, 1974.

JOEL HIRSCHHORN